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Wage and Hour Division, Labor

§ 541.303

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playing dramatic, comedy, or straight parts in a program; interviewing; conducting farm, fashion, and home economics programs; covering public events, such as sports programs, in which the announcer may be required to ad lib and describe current changing events; and acting as narrator and commentator. Such work is generally exempt. Work such as giving station identification and time signals, announcing the names of programs, and similar routine work is nonexempt work. In the field of radio entertainment as in other fields of artistic endeavor, the status of an employee as a bona fide professional under § 541.3 is in large part dependent upon whether his duties are original and creative in character, and whether they require invention, imagination or talent. The determination of whether a particular announcer is exempt as a professional employee must be based upon his individual duties and the amount of exempt and nonexempt work performed, as well as his compensation.

(C) The field of journalism also employs many exempt as well as many nonexempt employees under the same or similar job titles. Newspaper writers and reporters are the principal categories of employment in which this is found.

(1) Newspaper writers, with possible rare exceptions in certain highly technical fields, do not meet the requirements of § 541.3(a)(1) for exemption as professional employees of the "learned" type. Exemption for newspaper writers as professional employees is normally available only under the provisions for professional employees of the "artistic" type. Newspaper writing of the exempt type must, therefore, be "predominantly original and creative in character." Only writing which is analytical, interpretative or highly individualized is considered to be creative in nature. (The writing of fiction to the extent that it may be found on a newspaper would also be considered as exempt work.) Newspaper writers commonly performing work which is original and creative within the meaning of § 541.3 are editorial writers, columnists, critics, and "top-flight" writers of analytical and interpretative articles.

(2) The reporting of news, the rewriting of stories received from various sources, or the routine editorial work of a newspaper is not predominantly original and creative in character within the meaning of § 541.3 and must be considered as nonexempt work. Thus, a reporter or news writer ordinarily collects facts about news events by investigation, interview, or personal observation and writes stories reporting these events for publication, or submits the facts to a rewrite man or other editorial employees for story preparation. Such work is nonexempt work. The leg man, the reporter covering a police beat, the reporter sent out under specific instructions to cover a murder, fire, accident, ship arrival, convention, sport event, etc., are normally performing duties which are not professional in nature within the meaning of the act and § 541.3.

(3) Incidental interviewing or investigation, when it is performed as an essential part of and is necessarily incident to an employee's professional work, however, need not be counted as nonexempt work. Thus, if a dramatic critic interviews an actor and writes a story around the interview, the work of interviewing him and writing the story would not be considered as nonexempt work. However, a dramatic critic who is assigned to cover a routine news event such as a fire or a convention would be doing nonexempt work since covering the fire or the convention would not be necessary and incident to his work as a dramatic critic.

(38 FR 11390, May 7, 1973, Redesignated at 57 FR 48741, Oct. 9, 1992)

§ 541.303 Computer related occupations under Public Law 101-583.

(a) Pursuant to Public Law 101-583, enacted November 15, 1990, § 541.3(a)(4) provides that computer systems analysts, computer programmers, software engineers, or other similarly skilled workers in the computer software field are eligible for exemption as professionals under section 13(a)(1) of the Act. Employees who qualify for this exemption are highly-skilled in computer systems analysis, programming, or related work in software functions. Employees who perform these types of work have varied job titles. Included

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among the more common job titles are computer programmer, systems analyst, computer systems analyst, computer programmer analyst, applications programmer, applications systems analyst, applications systems analyst/programmer, software engineer, software specialist, systems engineer, and systems specialist. These job titles are illustrative only and the list is not intended to be all-inclusive. Further, because of the wide variety of job titles applied to computer systems analysis and programming work, job titles alone are not determinative of the applicability of this exemption.

(b) To be considered for exemption under § 541.3(a)(4), an employee's primary duty must consist of one or more of the following:

(1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;

(2) The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

(3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

(4) a combination of the aforementioned duties, the performance of which requires the same level of skills.

(c) The exemption provided by § 541.3(a)(4) applies only to highly-skilled employees who have achieved a level of proficiency in the theoretical and practical application of a body of highly-specialized knowledge in computer systems analysis, programming, and software engineering, and does not include trainees or employees in entry level positions learning to become proficient in such areas or to employees in these computer-related occupations who have not attained a level of skill and expertise which allows them to work independently and generally without close supervision. The level of expertise and skill required to qualify for this exemption is generally attained through combinations of education and experience in the field. While such employees commonly have

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a bachelor's or higher degree, no particular academic degree is required for this exemption, nor are there any requirements for licensure or certification, as is required for the exemption for the learned professions.

(d) The exemption does not include employees engaged in the operation of computers or in the manufacture, repair, or maintenance of computer hardware and related equipment. Employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs, e.g., engineers, drafters, and others skilled in computer-aided design software like CAD/CAM, but who are not in computer systems analysis and programming occupations, are also excluded from this exemption.

(e) Employees in computer software occupations within the scope of this exemption, as well as those employees not within its scope, may also have managerial and administrative duties which may qualify the employees for exemption under § 541.1 or § 541.2 (see §§ 541.205(c)(7) and 541.207(c)(7) of this subpart).

[57 FR 46744, Oct. 9, 1992; 57 FR 47163, Oct. 14, 1992]

§ 541.304 Primary duty.

(a) For a general explanation of the term "primary duty" see the discussion of this term under "executive" in § 541.103. See also the discussion under "administrative" in § 541.206.

(b) The "primary duty" of an employee as a teacher must be that of activity in the field of teaching. Mere certification by the State, or employment in a school will not suffice to qualify an individual for exemption within the scope of § 541.3(a)(3) if the individual is not in fact both employed and engaged as a teacher (see § 541.302(g)(2)). The words "primary duty" have the effect of placing major emphasis on the character of the employee's job as a whole. Therefore, employment and engagement in the activity of imparting knowledge as a primary duty shall be determinative with respect to employment within the meaning of the exemption as "teacher" in conjunction with the other requirements of § 541.3.

Wage and Hour Division, Labor

§ 541.305 Discretion and judgment

(a) Under § 541.3 a professional employee must perform work which requires the consistent exercise of discretion and judgment in its performance.

(b) A prime characteristic of professional work is the fact that the employee does apply his special edge or talents with discretion and judgment. Purely mechanical or routine work is not professional.

§ 541.306 Predominantly intellectual and varied

(a) Section 541.3 requires an employee be engaged in work which is predominantly intellectual and varied in character as opposed to routine manual, mechanical, or physical work. This test applies to the type of work which must be performed by the employee in question. While an employee may make 20 physical examinations the morning and perform in the afternoon his examinations essentially the same. It requires not only a high degree of discretion on his part but a continual variety of interpretative tests to perform satisfactory results. Likewise, although a professional chemist may make a series of tests, the problems presented to him as well as the deductions to be made therefrom. The work of the professional is inherently varied even if similar outward actions may be required.

(b) Another example of the professional medical technologist performs complicated chemical, microscopic, and bacteriological tests and procedures. In a large medical laboratory or clinic, the technologist specializes in making several related tests in areas such as bacteriology, parasitology, biochemistry, hematology, histology, cytology, clinical medical technology. The medical technologist also does the blood tests. He will also conduct tests related to the examination and treatment of patients, or do research on new techniques, or teach and perform administrative duties. The simple, and preliminary tests are generally performed by laboratory assistants or technicians. However, medical technologists who work in small

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Wage and Hour Division, Labor

§ 541.305 Discretion and judgment.

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§ 541.306 Predominantly intellectual and varied.

(a) Section 541.3 requires that the employee be engaged in work predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work. This test applies to the type of thinking which must be performed by the employee in question. While a doctor may make 10 physical examinations in the morning and perform in the course of his examinations essentially similar tests. It requires not only judgment and discretion on his part but a continual variety of interpretation of the tests to perform satisfactory work. Likewise, although a professional chemist may make a series of similar tests, the problems presented will vary as will the deductions to be made therefrom. The work of the true professional is inherently varied even though similar outward actions may be performed.

(b) Another example of this is the professional medical technologist who performs complicated chemical, microscopic, and bacteriological tests and procedures. In a large medical laboratory or clinic, the technologist usually specializes in making several kinds of related tests in areas such as microbiology, parasitology, biochemistry, hematology, histology, cytology, and nuclear medical technology. The technologist also does the blood banking. He will also conduct tests related to the examination and treatment of patients, or do research on new drugs, or on the improvement of laboratory techniques, or teach and perform administrative duties. The simple, routine, and preliminary tests are generally performed by laboratory assistants or technicians. However, technologists who work in small labora-

§ 541.307

tories may perform tasks that are performed by nonexempt employees in larger establishments. This type of activity will not necessarily be considered nonexempt, see § 541.307.

(c) On the other hand, X-ray technicians have only limited opportunity for the exercise of independent discretion and judgment, usually performing their duties under the supervision of a more highly qualified employee. The more complex duties of interpretation and judgment in this field are performed by obviously exempt professional employees.

§ 541.307 Essential part of and necessarily incident to.

(a) Section 541.3(d), it will be noted, has the effect of including within the exempt work activities which are an essential part of and necessarily incident to the professional work described in § 541.3 a through (c). This provision recognizes the fact that there are professional employees whose work necessarily involves some of the actual routine physical tasks also performed by obviously nonexempt employees. For example, a chemist performing important and original experiments frequently finds it necessary to perform himself some of the most menial tasks in connection with the operation of his experiments, even though at times these menial tasks can be conveniently or properly assigned to laboratory assistants. See also the example of incidental interviewing or investigation in § 541.303(a)(3).

(b) It should be noted that the test of whether routine work is exempt work is different in the definition of "professional" from that in the definition of "executive" and "administrative." Thus, while routine work will be exempt if it is "directly and closely related" to the performance of executive or administrative duties, work which is directly and closely related to the performance of the professional duties will not be exempt unless it is also "an essential part of and necessarily incident to" the professional work.

(c) Section 541.3(d) takes into consideration the fact that there are teaching employees whose work necessarily involves some of the actual routine duties and physical tasks also performed

§541.308

by nonexempt employees. For example, a teacher may conduct his pupils on a field trip related to the classroom work of his pupils and in connection with the field trip engage in activities such as driving a school bus and monitoring the behavior of his pupils in public restaurants. These duties are an essential part of and necessarily incident to his job as teacher. However, driving a school bus each day at the beginning and end of the school day to pick up and deliver pupils would not be exempt type work.

§541.308 Nonexempt work generally.

(a) It has been the Divisions' experience that some employers erroneously believe that anyone employed in the field of accountancy, engineering, or other professional fields, will qualify for exemption as a professional employee by virtue of such employment. While there are many exempt employees in these fields, the exemption of individual depends upon his duties and other qualifications.

(b) It is necessary to emphasize the fact that section 13(a)(1) exempts "any employee employed in a bona fide * * * professional capacity." It does not exempt all employees of professional employers, or all employees in industries having large numbers of professional members, or all employees in any particular occupation. Nor does it exempt, as such those learning a profession. Moreover, it does not exempt persons with professional training who are working in professional fields, but are performing subprofessional or routine work. For example, in the field of library science there are large numbers of employees who are trained librarians but who, nevertheless, do not perform professional work or receive salaries commensurate with recognized professional status. The field of "engineering" has many persons with "engineer" titles, who are not professional engineers, as well as many who are trained in the engineering profession, but are actually working as trainees, junior engineers, or draftsmen.

§541.309 20-percent nonexempt work limitation.

Time spent in nonexempt work, that is, work which is not an essential part

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of and necessarily incident to the exempt work, is limited to 20 percent of the time worked by the employee in the workweek.

§541.310 Trainees, professional.

The exemption applies to an employee employed in a bona fide professional capacity and does not include trainees who are not actually performing the duties of a professional employee.

§541.311 Amount of salary or fees required.

(a) Except as otherwise noted in paragraphs (b) and (c) of this section, compensation on a salary or fee basis at a rate of not less than \$170 per week, exclusive of board, lodging or other facilities, is required for exemption as a "professional employee." An employee will meet this requirement if paid a bi-weekly salary of \$340, a semi-monthly salary of \$368.32 or a monthly salary of \$736.67.

(b) In Puerto Rico, the Virgin Islands, and American Samoa the salary test for exemption as a "professional" for other than employees of the Federal Government is \$150 per week.

(c) The payment of the compensation specified in paragraph (a) or (b) of this section is not a requisite for exemption in the case of employees exempted from this requirement by the proviso to §541.3(a), as explained in §541.314.

(d) The payment of the required salary must be exclusive of board, lodging, or other facilities; that is, free and clear. On the other hand, the regulations in subpart A of this part do not prohibit the sale of such facilities to professional employees on a cash basis if they are negotiated in the same manner as similar transactions with other persons.

[38 FR 11390, May 7, 1973, as amended at 40 FR 7093, Feb. 19, 1975]

EFFECTIVE DATE NOTE: Paragraphs (a) and (b) in §541.311 were revised at 46 FR 3015, Jan. 13, 1981. In accordance with the President's Memorandum of January 29, 1981, 46 FR 11227, Feb. 5, 1981, the effective date was postponed indefinitely at 46 FR 11972, Feb. 12, 1981.

The text of paragraphs (a) and (b) set forth above remains in effect pending further action by the issuing agency. The text of the postponed regulation appears below.

Wage and Hour Division.**§541.311 Amount of salary.**

(a) Except as otherwise graphs (b) and (c) of this section on a salary or fee basis less than \$250 per week beginning 13, 1981 and \$230 per week beginning 13, 1983, exclusive of board, facilities, is required for "professional employee." For on \$230 a week, an employee requirement if paid a bi-weekly semi-monthly salary of \$460 or a monthly salary of \$1,150.33.

(b) In Puerto Rico, the Virgin Islands, and American Samoa the salary test for exemption as a "professional" for employees of the Federal Government is \$150 per week beginning February 13, 1981 and \$130 per week beginning February 13, 1983.

* * *

§541.312 Salary basis.

The salary basis of professional employees is defined in §541.311 in accordance with the definition of "executive" in Public Law 101-583, chapter 15, 1990, payment basis" is not a requirement in the case of those computer-related occupations defined in §541.3(a)(4) and otherwise meet the requirements of §541.3 and who are paid basis if their hourly rate is 8 1/3 times the minimum wage by section 3 of the Act.

[37 FR 46745, Oct. 9, 1972]

§541.313 Fee basis.

(a) The requirements for exemption as a professional for an employee may be met by one who is compensated on a fee basis, as well as by one who is paid on a salary basis.

(b) Little or no difficulty in determining whether a professional employee is employed on a fee basis. Payments are characterized by the nature of the agreement, regardless of the time for completion. These payments resemble piecework payments. An important distinction is speaking a fee payment is for a single job which is unique for a series of jobs which are an indefinite number of

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§ 541.313

§ 541.311 Amount of salary or fees required.

(a) Except as otherwise noted in para-
 graphs (b) and (c) of this section, compensa-
 tion on a salary or fee basis at a rate of not
 less than \$250 per week beginning February
 13, 1981 and \$250 per week beginning February
 13, 1983, exclusive of board, lodging or other
 facilities, is required for exemption as a
 "professional employee." For example, based
 on \$280 a week, an employee will meet this
 requirement if paid a biweekly salary of \$560,
 a semi-monthly salary of \$306.67 or a monthly
 salary of \$1,213.33.

(b) In Puerto Rico, the Virgin Islands, and
 American Samoa the salary test for exemp-
 tion as a "professional" for other than em-
 ployees of the Federal Government is \$275
 per week beginning February 13, 1981 and \$230
 per week beginning February 13, 1983.

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§ 541.312 Salary basis.

The salary basis of payment is ex-
 plained in § 541.118 in connection with
 the definition of "executive." Pursuant
 to Public Law 101-583, enacted Novem-
 ber 15, 1990, payment "on a salary
 basis" is not a requirement for exemp-
 tion in the case of those employees in
 computer-related occupations, as de-
 fined in § 541.310(a)(4) and § 541.303, who
 otherwise meet the requirements of
 § 541.3 and who are paid on an hourly
 basis if their hourly rate of pay exceeds
 $\frac{1}{2}$ times the minimum wage provided
 by section 6 of the Act.

[57 FR 4745, Oct. 9, 1992]

§ 541.313 Fee basis.

(a) The requirements for exemption
 as a professional (or administrative)
 employee may be met by an employee
 who is compensated on a fee basis as
 well as by one who is paid on a salary
 basis.

(b) Little or no difficulty arises in de-
 termining whether a particular em-
 ployment arrangement involves pay-
 ment on a fee basis. Such arrange-
 ments are characterized by the pay-
 ment of an agreed sum for a single job
 regardless of the time required for its
 completion. These payments in a sense
 resemble piecework payments with the
 important distinction that generally
 speaking a fee payment is made for the
 kind of job which is unique rather than
 for a series of jobs which are repeated
 an indefinite number of times and for

which payment on an identical basis is
 made over and over again. Payments
 based on the number of hours or days
 worked and not on the accomplishment
 of a given single task are not consid-
 ered payments on a fee basis. The type
 of payment contemplated in the regu-
 lations in subpart A of this part is thus
 readily recognized.

(c) The adequacy of a fee payment.
 Whether it amounts of payment at a
 rate of not less than \$170 per week to a
 professional employee or at a rate of
 not less than \$155 per week to an ad-
 ministrative employee can ordinarily
 be determined only after the time
 worked on the job has been determined.
 In determining whether payment is at
 the rate specified in the regulations in
 subpart A of this part the amount paid
 to the employee will be tested by refer-
 ence to a standard workweek of 40
 hours. Thus compliance will be tested
 in each case of a fee payment by deter-
 mining whether the payment is at a
 rate which would amount to at least
 \$170 per week to a professional em-
 ployee or at a rate of not less than \$155
 per week to an administrative em-
 ployee if 40 hours were worked.

(d) The following examples will illus-
 trate the principle stated above:

(1) A singer receives \$50 for a song on
 a 15-minute program (no rehearsal time
 is involved). Obviously the requirement
 will be met since the employee would
 earn \$170 at this rate of pay in far less
 than 40 hours.

(2) An artist is paid \$100 for a picture.
 Upon completion of the assignment, it
 is determined that the artist worked 20
 hours. Since earnings at this rate
 would yield the artist \$200 if 40 hours
 were worked, the requirement is met.

(3) An illustrator is assigned the il-
 lustration of a pamphlet at a fee of
 \$150. When the job is completed, it is
 determined that the employee worked
 80 hours. If the employee worked 40
 hours at this rate, the employee would
 have earned only \$100. The fee payment
 of \$150 for work which required 80 hours
 to complete therefore does not meet
 the requirement of payment at a rate
 of \$170 per week and the employee must
 be considered nonexempt. It follows
 that if in the performance of this as-
 signment the illustrator worked in ex-
 cess of 40 hours in any week, overtime

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rates must be paid. Whether or not the employee worked in excess of 40 hours in any week, records for such an employee would have to be kept in accordance with the regulations covering records for nonexempt employees (part 516 of this chapter).

[38 FR 11390, May 7, 1973, as amended at 40 FR 7093, Feb. 19, 1975]

EFFECTIVE DATE NOTE: Paragraphs (c) and (d) in § 541.313 were revised at 46 FR 3015, Jan. 13, 1981. In accordance with the President's Memorandum of January 29, 1981 (46 FR 11227, Feb. 4, 1981), the effective date was postponed indefinitely at 46 FR 11972, Feb. 12, 1981.

The text of paragraphs (c) and (d) set forth above remains in effect pending further action by the issuing agency. The text of the postponed regulation appears below.

§ 541.313 Fee basis.

(c) Examples of the adequacy of certain fee payments follow. For example, whether a fee payment amounts to payment at a rate of not less than \$280 per week to a professional employee or at a rate of not less than \$250 per week to an administrative employee can ordinarily be determined only after the time worked on the job has been determined. In determining whether payment is at the rate specified in the regulations in subpart A of this part the amount paid to the employee will be tested by reference to a standard workweek of 40 hours. Thus compliance will be tested in each case of a fee payment by determining whether the payment is at a rate which would amount to at least \$280 per week to a professional employee or at a rate of not less than \$250 per week to an administrative employee if 40 hours were worked.

(d) The following examples will illustrate the principle stated above:

(1) A singer receives \$50 for a song on a 15-minute program (no rehearsal time is involved). Obviously the requirement will be met since the employee would earn \$280 at this rate of pay in far less than 40 hours.

(2) An artist is paid \$150 for a picture. Upon completion of the assignment, it is determined that the artist worked 20 hours. Since earnings at this rate would yield the artist \$300 if 40 hours were worked, the requirement is met.

(3) An illustrator is assigned the illustration of a pamphlet at a fee of \$180. When the job is completed, it is determined that the employee worked 60 hours. If the employee worked 40 hours at this rate, the employee would have earned only \$180. The fee payment of \$180 for work which required 60 hours to complete therefore does not meet

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the requirement of payment at a rate of \$280 per week and the employee must be considered nonexempt. It follows that if in the performance of this assignment the illustrator worked in excess of 40 hours in any week, overtime rates must be paid. Whether or not the employee worked in excess of 40 hours in any week, records for such an employee would have to be kept in accordance with the regulations covering records for nonexempt employees (part 516 of this chapter).

§ 541.314 Exception for physicians, lawyers, and teachers.

(a) A holder of a valid license or certificate permitting the practice of law or medicine or any of their branches, who is actually engaged in practicing the profession, or a holder of the requisite academic degree for the general practice of medicine who is engaged in an internship or resident program pursuant to the practice of his profession, or an employee employed and engaged as a teacher in the activity of imparting knowledge, is excepted from the salary or fee requirement. This exception applies only to the traditional professions of law, medicine, and teaching and not to employees in related professions which merely serve these professions.

(b) In the case of medicine:

(1) The exception applies to physicians and other practitioners licensed and practicing in the field of medical science and healing or any of the medical specialties practiced by physicians or practitioners. The term physicians means medical doctors including general practitioners and specialists, and osteopathic physicians (doctors of osteopathy). Other practitioners in the field of medical science and healing may include podiatrists (sometimes called chiropodists), dentists (doctors of dental medicine), optometrists (doctors of optometry or bachelors of science in optometry).

(2) Physicians and other practitioners included in paragraph (b)(1) of this section, whether or not licensed to practice prior to commencement of an internship or resident program, are excepted from the salary or fee requirement during their internship or resident program, where such a training program is entered upon after the earning of the appropriate degree required

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for the general practice of the profession.

(c) In the case of medical professions, the exception from the fee requirement does not apply to pharmacists, nurses, therapists, radiologists, sanitarians, dietitians, workers, psychometrists, or other workers which service the medical profession.

§ 541.315 Special proviso for professional employee

(a) Except as otherwise provided in paragraph (b) of this section, the exception from the salary or fee requirement for employees compensated on a salary or fee basis of at least \$250 per week of board, lodging, or other facilities. Under this proviso, the employee will be deemed to be an employee who receives a salary or fees and whose primary duty consists of the performance of work requiring knowledge of an advanced field of science or learning, or work as a teacher in the activity of imparting knowledge, which work requiring the exercise of discretion and judgment, or the performance of work involving invention, imagination, or the recognized field of artistic creation. Thus, the exemption will apply to paid employees employed in one of the "learned" professions, an "artistic" profession and in which the employee's primary duty is professional work. If the employee qualifies for exemption under this proviso, it is not necessary that the employee's qualifications be under § 541.3 (a) through (e).

(b) In Puerto Rico, the Virgin Islands, and American Samoa, the proviso of § 541.3(a) applies to "professional" employees of the Federal Government who are compensated on a salary basis of not less than \$200 per

[40 FR 7093, Feb. 19, 1975]

EFFECTIVE DATE NOTE: Section revised at 46 FR 3013, Jan. 13, 1981, in accordance with the President's Memorandum of January 29, 1981 (46 FR 11227, Feb. 4, 1981), the effective date was postponed indefinitely at 46 FR 11972, Feb. 12, 1981.

